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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 404 .

In the Matter of the Arbitration of Certain Controversies between

LIONEL LANE, as President of ENDICOTT LEATHER WORKERS' UNION, LOCAL 285, INTERNATIONAL FUR AND LEATHER WORKERS' UNION OF THE UNITED STATES AND CANADA, CIO,

~~*Petitioner (Appellee)*~~,

—and—

ENDICOTT JOHNSON CORPORATION,

~~*Respondent (Appellant)*~~. Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, BROOME COUNTY, AND BRIEF IN SUPPORT THEREOF.

HOWARD A. SWARTWOOD,
Attorney for Endicott Johnson Corporation,
Sales Building,
Endicott, New York.

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LIONEL LANE, as President of ENDICOTT LEATHER WORKERS' UNION, LOCAL 285, INTERNATIONAL FUR AND LEATHER WORKERS' UNION OF THE UNITED STATES AND CANADA, CIO,

Petitioner (Appellee),

—and—

ENDICOTT JOHNSON CORPORATION,

Respondent (Appellant).

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Broome County.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Endicott Johnson Corporation respectfully prays that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered herein on the 19th day of July, 1949, and the judgment entered thereon in the Office of the Clerk

of the Supreme Court of the State of New York, Broome County, on the 8th day of August, 1949.

A final judgment has now been entered herein and Endicott Johnson Corporation has completely exhausted the remedies available to it within the State of New York.

Statement of the Matter Involved.

Endicott Johnson Corporation is a manufacturer of shoes, employing approximately 18,000 workers in its tanneries and shoe factories.

The Appellee (Petitioner in the Court below) is a labor organization (hereinafter referred to as the "Union") which was certified as the bargaining agent by the National Labor Relations Board for a certain unit of Endicott Johnson Corporation's (hereinafter referred to as the "Employer") employees in December, 1942.

Thereafter, pursuant to and by reason of such certification, the Employer entered into collective bargaining negotiations with the Union and finally concluded a collective agreement which expired by its terms on June 1, 1947.

After the contract expired by its terms, the Union abandoned the bargaining unit.

About three or four months before the expiration of the union agreement, certain alleged grievances arose which were not disposed of either by agreement between the Employer and the Union or by arbitration as provided for in the agreement.

On June 27, 1947, which was after the Union ceased being the bargaining agent, the Union commenced a proceeding, which is the subject of the appeal herein,

under Article 84 of the Civil Practice Act of the State of New York* to compel the Employer to continue to bargain with it by proceeding to arbitration as to those matters which allegedly were not settled during the contract term.

In the meantime, and on May 13, 1947, the Union had itself raised a question as to its representative status by filing a petition with the National Labor Relations Board asking that an election be held.**

While the Union's application to compel the Employer to proceed to arbitration under Article 84 of the Civil Practice Act of the State of New York was pending, the National Labor Relations Board ordered a hearing on the representation question of the bargaining unit by this Union for August 11, 1947.

At the hearing on August 11, 1947 before the Trial Examiner of the National Labor Relations Board, the Union formally withdrew its petition, thus abandoning the bargaining unit as a matter of law.***

The Employer contends that since this Union admittedly is not the duly authorized bargaining agent for the bargaining unit, the Employer is proscribed by Federal statute (the Labor-Management Relations Act, 1947) from entering the collective bargaining arena with it, and that a state court may not, by means of a state statute, order such collective bargaining to continue.

The New York Supreme Court, Broome County, Special Term, on November 7, 1947, granted the

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* The relevant portions of Article 84 of the Civil Practice Act of the State of New York are set forth in Appendix 1.

** See Appendix 2 for a copy of the petition filed with the National Labor Relations Board.

*** See Appendix 3 for order of N. L. R. B. authorizing withdrawal of Union's petition for certification.

Union's application and directed the parties to proceed to arbitration on the ground that when an application is made under Article 84 of the Civil Practice Act of the State of New York, all the state court may consider is (fol. 250):

1. Whether a contract to arbitrate was made, and

2. Whether there has been a refusal to proceed to arbitration.

On July 7, 1948, the Appellate Division of the Supreme Court affirmed the order of Special Term with a *per curiam* opinion (fol. 313) which, in substance, adopted the reasoning of the Court below.

The Appellate Division of the Supreme Court denied leave to appeal to the Court of Appeals. However, the Court of Appeals did grant leave to appeal on November 24, 1948 (fol. 295).

On July 19, 1949, the Court of Appeals unanimously affirmed the order of the Appellate Division of the Supreme Court (R. 109).

The Employer is faced with an order of the Supreme Court of the State of New York which directs it to bargain collectively with a Union with which it is proscribed from bargaining by the Labor-Management Relations Act, 1947, a Federal statute (29 U. S. C. A. Secs. 141 *et seq.*).

Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States in this appeal is Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A. 344(a).

The present case involves a final judgment in the highest court of the State of New York where there was drawn in question the validity of a statute of that state, namely, Article 84 of the Civil Practice Act,* on the ground of its being repugnant to the Labor-Management Relations Act, 1947,** a Federal statute, and the decisions of this Court interpreting said Federal statute.

The Facts.

There is no dispute as to the facts.

The Union based its application for the order granted below compelling arbitration upon the collective bargaining agreement entered into between the Union and the Employer, dated June 1, 1944, supplemented by agreement dated April 19, 1946, and which agreements expired by their terms on June 1, 1947 (fols. 19-21). As of June 1, 1947 and thereafter, the Union and the Employer were no longer under any contractual relationship, the Union was not the bargaining agent and the Employer thereafter refused to bargain with this Union (fol. 158).

Even before the expiration of the contract on June 1, 1947, the Union on May 13, 1947, recognizing that its own majority status was in doubt and that a question concerning representation had arisen, filed a petition with the National Labor Relations Board to have its majority status in the bargaining unit determined (Appendix 2). An investigation was conducted by the National Labor Relations Board and a hearing was thereafter commenced on this representation

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* See Appendix 1 for relevant portions of statute.

** Act of June 23, 1947, Secs. 101 *et seq.*, 61 Stat. 136 *et seq.*, 29 U. S. C. A. Secs. 141 *et seq.*

question on August 11, 1947 by the National Labor Relations Board. On that day, the Union withdrew its petition and with it any claim to representation of any of the Employer's employees. (See Appendix 3.)

The proceeding to compel the Employer to proceed to arbitration was not commenced until June 27, 1947 (fol. 16), which was *after* the Union recognized that it was no longer the bargaining agent or at least that its representative status was in doubt.

In or about March, 1947, a dispute had arisen between the Employer and the Union regarding certain wage rates. The Employer contended that wage rates were not subject to adjustment during the term of the agreement in view of the supplemental agreement dated April 19, 1946, which specifically provided that:

> "Agreement, including the wage rates so modified, shall continue in effect without further reopening until June 1, 1947" (fol. 159).

The Employer, however, immediately offered to submit this question to arbitration under the terms of the agreement.

The Union, however, refused to agree to such an arbitration (fol. 159).

Instead, on March 20, 1947, the workers refused to work and engaged in a strike in violation of Article III(d) of the agreement (fols. 60, 159).

The Employer again offered to arbitrate the question of whether any change had occurred in the operation involved which, under the terms of the agreement, would entitle the workers to an adjustment, and on March 20, 1947, submitted to the Union two written forms of submission (Exhibits 3 and 4 annexed to the answer (fols. 214-220)).

The Union still refused to arbitrate (fol. 161).

On the same day, the Employer, by telegram, advised Ben Gold, President of the Union on strike, that arbitration had been refused, and requested compliance with the contract (fol. 162). On March 22, 1947, an answer was received from the assistant to the President of the Union which stated that before the men would return to work, the adjustments had to be made (fol. 164).

The Union still refused to arbitrate.

On the same day, March 22, 1947, the Employer again sent a telegram to the President of the Union which stated, in part, as follows (fol. 165):

> "Your telegram March twenty-first evades the issue Stop Honest and sincere efforts of company to settle disputes mentioned have been unavailing Stop Our Contract now requires their arbitration and we demand you fulfill your obligation under it by ordering employees back to work pending settlement pursuant to agreed upon procedure."

Despite this exchange of telegrams and all efforts of the Employer to proceed to arbitration in accordance with the agreement, the men still refused to work and the Union still refused to arbitrate (fol. 167).

On March 27, 1947, the Employer received a telegram from the District Director of the Union in which it again refused to permit the employees to return to work and ignored the Employer's request to arbitrate (fol. 168).

The Employer immediately replied by letter to the Union advising that the employees had no right to engage in a work stoppage in violation of the no-

strike provision of the collective bargaining agreement, especially where the agreement specifically provided that the wage rates were to continue in force until the termination date of the contract. Nevertheless, the Employer again offered to arbitrate and again sent to the Union two forms of submission (fols. 171-175).

It was not until April 1, 1947, after a strike of twelve days, that the Union would even agree to a form of submission. On April 2, 1947, the employees returned to work (fol. 176).

The contract then in force provided for the submission of disputes to an Appeal Board, consisting of two representatives of the Employer and two representatives of the Union who selected, jointly, the fifth additional member of the Board (fol. 105).

On April 1, 1947, when the form of submission was agreed to, the Union submitted certain names as a possible fifth member of the Appeal Board (fol. 177).

On April 2, 1947, the Employer replied by letter, stating that it had been unable to obtain any information which would indicate that the man suggested by the Union had any experience in the tanning industry. The Court below in its opinion (fol. 277) recognized that such an arbitrator must possess technical skill and knowledge. Accordingly, the Employer suggested the name of one Dr. Robert Brecht, who is the Impartial Arbitrator for the tanning industry in the Philadelphia area (fol. 178), as the fifth member of the Appeal Board to act as chairman in the wage dispute.

On April 2, 1947, the three employees, referred to in paragraph 8 of the petition (fol. 37), were discharged because, as officers and stewards of the Union, they had instigated, supported and led the strike in violation of the contract (fol. 178).

The Union protested the discharges and after discussion, the Union and the Employer agreed, on April 11, 1947, to submit the discharge question to arbitration (fol. 179). It was further agreed that the disputes with respect to the discharges and with respect to the wage question should be tried separately and that each party should notify the other on April 15, 1947 of the persons who would represent them on the two Appeal Boards, and that these representatives should thereafter confer regarding the additional fifth member in each of the two cases (fol. 180).

On April 15, 1947, the Employer, by its Secretary and counsel, Howard A. Swartwood, Esq., telephoned the International Representative of the Union and advised him that he, Mr. Swartwood, and Mr. Ralph B. Clark would be the representatives for the Employer on the Appeal Board. The Union named its two representatives. Mr. Swartwood then suggested that Dr. Brecht be the additional fifth member of the Appeal Board in the discharge case also (fols. 180-181).

Nothing further was heard from the Union until May 3, 1947, when a representative of the Union telephoned to Mr. Swartwood, requesting a meeting of the Employer and Union representatives on May 5, 1947 (fol. 182).

At the May 5th meeting, the Union advised the Employer that it would accept Dr. Brecht as arbitrator in any one of the cases, provided the Company would accept one of the men named in a list submitted by the Union in the other case. Among the list submitted by the Union, was one John A. Rooney of Albany, New York (fol. 183).

Mr. Swartwood agreed to investigate the background and qualifications of these additional persons suggested by the Union and to report to the Union (fol. 183).

On May 15, 1947, the Employer advised the Union by letter (fol. 226) that it would accept Mr. John A. Rooney of Albany, New York, who was one of the persons named by the Union to be the fifth man on the Appeal Board.

On May 16, 1947, a representative of the Union telephoned to Mr. Swartwood, stating that the Union no longer desired Mr. John A. Rooney, although he was the Union's own nominee (fol. 184).

The Union then made the proposal that it would accept Dr. Brecht in either of the cases provided the Company would accept a Mr. Saul Wallen of Boston as arbitrator in the other case (fol. 185). After investigation, the Union was advised on May 19, 1947 that Mr. Wallen was not acceptable and the Employer suggested Mr. Maxwell Copelof (fol. 186) who was formerly with the United States Conciliation Service.

Nothing further was heard from the Union until May 27, 1947, four days before the collective bargaining agreement expired by its terms (fol. 186) and after the Union admitted, by filing the "Petition for Certification of Representatives" (Appendix 2), that its own representative status was in doubt. The Union was then informed that the Employer had been advised by counsel that after the expiration of the agreement and in view of the pending petition before the National Labor Relations Board, it would be illegal for the Employer to arbitrate any matter with the Union until the question of representation was determined (fol. 186).

But even at this late date, the Union was still juggling around the fifth man for the Appeal Board and proposed that Mr. Copelof serve in the discharge case instead of Dr. Brecht as suggested by the Employer, and that Dr. Brecht should serve in the wage rate case.

This was not acceptable to the Employer and at the conclusion of the conference, a representative of the Union told Mr. Swartwood that he "would hear from him later" (fol. 188).

On May 29, 1947, the Employer received a letter from the Union's counsel, which recognizes that the Union will not represent the employees after June 1, 1947, but insists that it is the Employer's legal obligation to arbitrate with the Union anyhow (fol. 238).

Pursuant to the "Petition for Certification of Representatives" (Appendix 2) that had been filed by the Union, a hearing was held by the National Labor Relations Board on August 11, 1947 (Appendix 3). At this hearing, the Union withdrew its petition in which it sought certification as bargaining agent (Appendix 3).*

The Decisions of the Supreme Court of the State of New York, the Appellate Division and the Court of Appeals.

Since the Court of Appeals affirmed without opinion, it may be assumed that they adopted the reasoning of the Appellate Division.

The reasoning of the Appellate Division and Special Term for directing arbitration may be found in

* See: *In the Matter of Endicott Johnson Corporation* and *Local 285, International Fur and Leather Workers Union, CIO*, National Labor Relations Board case No. 3-R-1572, decided August 9, 1947. For the convenience of the Court, we annex hereto as Appendix 2 a copy of the petition filed by the Union in that proceeding and as Appendix 3 a copy of the N. L. R. B. order granting the Union's motion to withdraw said representation petition. Annexed hereto as Appendix 4 is a copy of the motion of another Union to intervene in the representation proceeding, which motion was granted, thereby raising a dual representation question.

the following statement in the decision of the Appellate Division (fol. 318):

> "The only issue in a proceeding of this character is whether a contract to arbitrate was, in fact, made and whether there is a refusal to proceed to arbitrate."

It should be made clear at this point that references in the opinions of the Appellate Division and Special Term to the effect that the expiration of a contract in and of itself does not prevent the ordering of arbitration have no bearing in this case. It is not the Company's contention that the mere expiration of the union agreement prohibits the direction of arbitration, but that in this particular case the expiration of the union agreement occurred at the time that the Union lost its bargaining status and abandoned the bargaining unit.

Question Involved and Reasons for Granting the Writ.

MAY AN EMPLOYER BE COMPELLED UNDER A STATE STATUTE TO PROCEED TO ARBITRATION, WHICH IS BUT A STEP IN THE PROCESS OF COLLECTIVE BARGAINING, WITH A UNION AS BARGAINING AGENT WHEN THE EMPLOYER IS PROSCRIBED FROM RECOGNIZING THAT UNION AS BARGAINING AGENT BY AN ALL-CONTROLLING FEDERAL STATUTE?

The decision of the New York courts in this case is in direct conflict with the Labor-Management Relations Act, 1947 and with the decisions of this Court.

The New York State courts have directed an employer to collectively bargain with a union which admittedly:

1. Does not represent a majority of the employees in the bargaining unit.

2. Has disclaimed and abandoned its certification and no longer is the bargaining agent.

The Labor-Management Relations Act, 1947 and the public policy of the United States therein expressed makes it unlawful for an employer to bargain collectively with any union but the duly authorized representative of a majority of his employees. *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678.

Importance of the Question Involved.

If this decision, which is based upon a clear misconception of the nature, extent and operation of collective bargaining rights pursuant to a certification of the National Labor Relations Board, is permitted to stand, it will introduce utter chaos in the field of labor law.

The Congress of the United States has clearly and unequivocally conferred upon the National Labor Relations Board the sole and exclusive jurisdiction to determine where and upon whom bargaining rights shall rest. That Federal statute makes it equally clear that it is the public policy of the United States that an employer bargain with the duly authorized bargaining agent of his employees, and, conversely, he is proscribed from bargaining with any other.

In this case, this Union admittedly is not the bar-

gaining agent and has chosen to spurn the processes of the National Labor Relations Board which is the only forum from which it could receive a status as bargaining agent.

Instead, apparently having recognized that it could not be successful in a secret election duly conducted by the National Labor Relations Board, it has sought, through the circuitous method of a state statute, to retain and continue the rights and privileges which were afforded to it only in its status as the duly authorized bargaining agent.

The National Labor Relations Board has entered an order (see Appendix 3) permitting the Union to withdraw its Petition for Certification, which, as a matter of law, constitutes an abandonment of the bargaining unit by the Union and a waiver of any bargaining rights that it may have had under its former certification.

If the Employer undertakes to recognize this Union as bargaining agent, the Employer would be committing an unfair labor practice since it may not recognize and bargain with a union which, in fact, is not the bargaining agent for the employees.

On the other hand, if the Employer fails to proceed to arbitration and continue collective bargaining with this Union, it would violate the order of the courts of the State of New York.

We thus have a decision of the highest court in the State of New York interpreting a state statute which is repugnant to a Federal statute and the decisions of this Court.

The seriousness of this situation is further evident when we project the consequences that naturally flow from it.

By this circuitous method, the Union has been per-

mitted to circumvent the Labor-Management Relations Act, 1947 and the National Labor Relations Board in order to keep its bargaining agency status.

Under the Labor-Management Relations Act, 1947, there is a provision for decertification which means that the employees may seek a union's decertification, a step which this Union has taken itself by abandoning its Petition for Certification.

Applying the decision of the New York State courts in this case, a union could, after it is decertified, claim that certain grievances were not settled under an old contract and certification, and thus compel the employer to continue to bargain with it, even though the employees have chosen otherwise.

Let us carry the consequences a step further.

A second union may become the bargaining agent for the same bargaining unit by reason of a National Labor Relations Board certification. Under the New York decisions, however, an employer would be compelled to bargain not only with the certified union, pursuant to the mandate of the National Labor Relations Board, but also with the decertified union by reason of the state statute which directs arbitration without regard to where bargaining rights rest under the Federal statute.

These results obviously were not within the intention of Congress when it passed the Labor-Management Relations Act, 1947, and that is the reason that bargaining rights must be determined only by one forum, the National Labor Relations Board, and where bargaining rights are a bona fide issue in a case, as it is here, a state court cannot interpret a state statute which will transcend and override the Federal statute.

WHEREFORE, petitioner prays that this Court issue a writ of certiorari to the Supreme Court of the State of New York, Broome County, directing said court to send to this Court, for a review of the decision of the New York Court of Appeals rendered on July 19, 1949, a full transcript of the record in said Court of Appeals in the case entitled:

"In the Matter of the Arbitration of Certain Controversies between

LIONEL LANE, as President of ENDICOTT LEATHER WORKERS' UNION, LOCAL 285, INTERNATIONAL FUR AND LEATHER WORKERS' UNION OF THE UNITED STATES AND CANADA, CIO,
Petitioner-Respondent,

and

ENDICOTT JOHNSON CORPORATION,
Appellant."

filed in the Office of the Clerk of Broome County, and that the decision of said Court of Appeals be reversed, and for such other further relief in the premises as may be just.

Dated, Endicott, N. Y., October 14, 1949.

ENDICOTT JOHNSON CORPORATION,
By: HOWARD A. SWARTWOOD,
Attorney for Endicott Johnson Corporation.

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Petitioner (Appellee),

—and—

ENDICOTT JOHNSON CORPORATION,

Respondent (Appellant).

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the New York Supreme Court, Broome County, is set out at folio 250.

The opinion of the Appellate Division is set out at folio 313.

The order and judgment of the Court of Appeals,

dated July 13, 1949, affirming the order of the Appellate Division, is printed at pages 109 to 112 of the record.

Jurisdiction of This Court.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States in this appeal is Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A. 344(a).

The present case involves a final judgment in the highest court of the State of New York where there was drawn in question the validity of a statute of that state, namely, Article 84 of the Civil Practice Act,* on the ground of its being repugnant to the Labor-Management Relations Act, 1947,** a Federal statute, and the decisions of this Court interpreting said Federal statute.

The Facts.

The facts are stated in the petition and will not be repeated here.

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* See Appendix 1.

** Act of June 23, 1947, Secs. 101 *et seq.*, 61 Stat. 136 *et seq.*, 29 U. S. C. A. Secs. 141 *et seq.*

POINT I.

By the circuitous method of this proceeding the Union is attempting to acquire bargaining rights and thereby circumvent the exclusive jurisdiction of the National Labor Relations Board—the only agency which by statute has the jurisdiction to determine upon whom bargaining rights shall rest.

The arbitration of labor disputes pursuant to a collective bargaining agreement is merely the extension of the collective bargaining process.

The United States Supreme Court, in *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, held:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the representatives of his employees. The obligation being exclusive (see Section 9(a) of the Act) 29 USC, Section 159(a), *it exacts the 'negative duty to treat with no other'.*" (Italics added.)

Thus, as a matter of law, when this Union filed a petition with the National Labor Relations Board on May 13, 1947, in which it alleged that a question concerning representation existed, the Employer was affirmatively prohibited from dealing with this Union until the question concerning representation was resolved by the National Labor Relations Board.

The Union has, throughout this proceeding, argued that it was brought merely "to vindicate rights fixed by contract when the Union concededly was bargaining representative".

By this argument, the Union assumes that it, as such, as distinguished from its status of bargaining agent, acquires enforceable rights in the contract. In this, the Union is in error as was held in *N. L. R. B.* v. *Medo Photo Supply Corp.,* 135 F. (2d) 279 (C. C. A. 2), affd. 321 U. S. 678:

> "Moreover, there can be no warrant for saying that the selection of a representative gives him personally any interest which the law need, or indeed should, recognize; his authority is purely derivative and the majority may cancel it as soon as they choose and resume their power as principal: at least until the Board, as a measure of administrative convenience, sees fit to regulate such substitutions."

If the Union contended that the Employer was obligated to bargain with it the proper and sole forum to determine that issue was the National Labor Relations Board.

The collective bargaining agreement does not establish a relationship; it is but a set of rules which guide the conduct of the parties so long, but only so long, as the relationship of employer and duly designated bargaining agent exists in fact.

The United States Supreme Court, in *J. I. Case Company* v. *N. L. R. B.*, 321 U. S. 332, held:

> "*Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in*

that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. *Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established.*

* * * *

"*Care has been taken in the opinions of the Court to reserve a field for the individual contract,* even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, *because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur; Men may continue work after a collective agreement expires* and despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern. *The conditions for collective bargaining may not exist;*

thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts." (Italics added.)

From the foregoing authority, it is clear that the collective bargaining agreement does not give to a union the status of bargaining agent for the employees in a bargaining unit. This status, if it exists, must arise from the fact that the union actually represents a majority of the employees in the bargaining unit. If it does, the employer is required to bargain with the union as bargaining agent, whether there is a contract or not. If the union does not represent a majority of the employees, then a contract entered into or continued between the employer and the union, giving the latter exclusive bargaining rights, would be null and void and violative of the Labor-Management Relations Act, 1947.

A union's right, under a collective bargaining agreement, is a derivative one and the union acquires no rights in or to an agreement, except so long as the source from which its authority is derived continues that flow of authority. The right of a union to demand arbitration is no stronger than its right to demand collective bargaining recognition.

The circuitous method used by the Union where

it cannot establish bargaining rights before the National Labor Relations Board is not novel.

In *Amazon Cotton Mill* v. *Textile Workers,* 167 F. (2d) 183 (C. C. A. 4), 21 L. R. R. M. 2605 (April 1, 1948), a union had been certified by the Board in 1943 as bargaining representative and negotiated wage agreements with the company which were renewed from time to time and extended to February 28, 1947. In the month preceding the expiration of the agreement, the company refused to bargain any further. The union sought an injunction to enforce the contract and compel the employer to continue bargaining.

The District Court accepted jurisdiction. The Circuit Court reversed and held:

> "It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the act were those determined by the National Labor Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."
>
> * * *
>
> "We do not mean to say that unusual cases may not arise where courts of equity could be called upon to protect the rights of parties created by the act. *Cf. Steele* v. *L. & N. R. Co.,* 323 U. S. 192 (15 L. R. R. Man. 708); *A. F. of L.* v. *N. L.*

R. B., 308 U. S. 401, 412 (5 L. R. R. Man. 670). What we have here, however, is not an unusual case calling for the exercise of extraordinary jurisdiction, but an ordinary unfair labor practice case involving alleged refusal to bargain. For such a case, the plaintiff has been provided an adequate administrative remedy before the Labor Board; and certainly the extraordinary powers of a court of equity may not be invoked until this administrative remedy has been exhausted. *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 4 Cir. 91 F. 2d 831 (1 L. R. R. Man. 257), aff'd 303 U. S. 53 (1-A L. R. R. Man. 580)."

This case was followed by *International Longshoremen's and Warehousemen's Union, Local 6, CIO* v. *Sunset Line & Twine Co.* (April 7, 1948) (U. S. District Court), 77 F. Supp. 119, 21 L. R. R. M. 2635).

In the above case, for approximately ten years the union served as collective bargaining agent for the employees of the defendant. In 1947, when plaintiff sought to renew its collective bargaining agreement with defendant, defendant refused to bargain collectively with plaintiff and refused to recognize plaintiff as the designated bargaining agent of its employees.

The action was then brought to compel the defendant company to bargain. The Court, in declining jurisdiction, held:

"It is manifest that plaintiff has not seen fit to invoke the jurisdiction of the National Labor Relations Board in the manner clearly provided

for. This suit represents a circuitous method or means of avoiding or attempting to avoid the clear mandate of the statute. To say that the United States District Courts, under such circumstances, have concurrent jurisdiction is to create therein a forum for every conceivable labor-management grievance which properly reposes within the confines, province and exclusive jurisdiction of the Board."

That is exactly what the Union has attempted to do in the instant case.

Knowing full well that it does not represent the employees and, therefore, has no standing before the Board, it attempts by this procedure to continue itself as collective bargaining agent.

This Union must be relegated to the National Labor Relations Board for a determination of its collective bargaining status. Until that status is determined, a state court has no jurisdiction to grant collective bargaining rights and this Union has no title in the character in which it brings this proceeding.

The only forum, in which this Union's capacity to bring this proceeding may be determined, is the National Labor Relations Board, and this forum the Union has chosen to spurn.

POINT II.

The Union disclaimed and abandoned its certification and no longer is the bargaining agent.

This Union was certified as the bargaining agent by the National Labor Relations Board on December 30, 1942 (fol. 54).

> About a year under ordinary circumstances is considered the reasonable period of time during which it is the policy of N. L. R. B. to treat its certification as identifying the statutory bargaining agent with certainty and finality. *Kimberly-Clark Corp.*, 16 LRRM 77, 78, 61 N. L. R. B. 90.

On May 13, 1947, which was about two weeks before the contract expired (fol. 21) and about 4½ years after certification, recognizing that its old certification was impotent, the Union itself filed a "Petition for Certification of Representatives" with the National Labor Relations Board. (See Appendix 2.)

That petition alleges that a question concerning representation has arisen and requests that the National Labor Relations Board conduct an investigation and an election to determine whether or not the employees wanted this Union as the bargaining agent, another union which asserted bargaining rights (see Petition of Intervenor, Appendix 4), or no union.

Section 9(c) of the Labor-Management Relations Act, *supra,* requires that:

> ". . . the Board shall investigate such petition and if it has reasonable cause to believe that a

question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

Accordingly, the National Labor Relations Board conducted an investigation and upon determining that there was a question concerning representation of the bargaining unit, scheduled a hearing pursuant to Section 9(c) of the Act for August 11, 1947.

AT THIS HEARING THE UNION WITHDREW ITS PETITION BY WHICH IT HAD SOUGHT TO BECOME THE BARGAINING AGENT. (See Appendix 3 for order of National Labor Relations Board.)

Thereafter, the Union abandoned all its efforts in seeking to represent the employees in the bargaining unit with the exception of the application made by it in the New York State courts to compel the Employer to proceed to arbitration, which application is the subject of this appeal.

By Withdrawing Its "Petition for Certification of Representatives", the Union Thereby Disclaimed and Abandoned All Right to Represent the Employees and Has Waived Any Obligation the Employer May Have Had to Recognize It as Bargaining Agent.

The National Labor Relations Board, in *Ny-Lint Tool & Mfg. Co.*, 22 LRRM 1061, 77 N. L. R. B. No. 100, defined the rights and obligations of an employer and union when the union withdraws its claim to represent the employees. In that case the union represented the employees of the employer for several years. About a month before the contract was to expire, the union submitted proposed modifications, for a new contract. The employer expressed doubt that the union represented a majority of its em-

ployees and refused to negotiate a new contract, and filed a representation petition. At the hearing on the petition, the union withdrew its claim to represent the employees.

The Board held:

> "The question of representation, although brought to the Board's attention by the employer's petition, was raised by the affirmative claim of the union to represent a majority of the employer's employees in the production and maintenance unit. The union has now withdrawn its claim to represent the employees in the production and maintenance unit which is the unit designated in the employer's petition as well as the unit designated in the union's own proposed contract. The union has thereby abandoned its right to represent these employees and has waived any obligation the employer may have had to recognize it as the bargaining representative of such employees."

A somewhat similar situation was presented to the National Labor Relations Board in *Federal Shipbuilding & Drydock Company,* 22 LRRM 1034, 77 N. L. R. B. No. 78. In that case the union was certified on September 20, 1946. On February 28, 1948, the Board directed a decertification election. On March 16, 1948, the union requested that its name be removed from the ballot in the coming election. The Board dismissed the decertification petition and held:

> "We regard the union's request to remove its name from the ballot as a disclaimer of its status as exclusive bargaining representative of the employees in the unit and a relinquishment of any

surviving rights as such representative under the 1945 certification. We find that whatever vitality the certificate might otherwise still have to establish the union's representative status is necessarily cancelled by the union's own disclaimer."

In *Terrytoons, Inc.*, 22 LRRM 1041, 77 N. L. R. B. No. 81, the union was certified in June, 1943. A collective bargaining agreement was entered into which expired in June, 1945. Thereafter, a decertification petition was filed and the union intervened to sustain its certification. At the hearing the union moved to withdraw its intervening petition. The Board thereupon dismissed the decertification petition, holding:

"Although the intervenor actively participated in the hearing, we deem its motion to withdraw therefrom and its request that its name be removed from the ballot to be a clear indication that it no longer claims the status of majority representative pursuant to its prior certification by the Board. Whatever vitality the certificate might otherwise still have to establish the intervenor's representative status is necessarily cancelled by the intervenor's own disclaimer. We find, therefore, in view of this disclaimer that the intervenor has relinquished its position as such majority bargaining representative."

POINT III.

Since this Union is no longer the bargaining agent for the employees, the employer is proscribed by Federal statute from entering the collective bargaining arena with it.

So inimical to the general welfare is the proposition that a union not the chosen representative of the employees may act as their bargaining agent, that Congress has seen fit to express the contrary as the national public policy.

Section 1 of the Labor-Management Relations Act, *supra*, states:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of . . . designation of *representatives of their own choosing*. . . ."

In *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, the Supreme Court held:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive (see Section 9(a) of the Act, 29 U. S. C. Section 159(a)), *it exacts the 'negative duty to treat with no other'*."

In *Hughes Tool Company* v. *N. L. R. B.*, 15 LRRM 852, 147 Fed. 2d 69, 72, the question was squarely presented whether individual employees could present their grievances through a union which is not the designated representative of the majority. An Independent union was certified as bargaining agent on November 13, 1941. On December 26, 1942, the United Steel Workers, CIO, won an election and was certified. The company continued to handle grievances through the Independent union for its members on the ground that Section 9(a) of the National Labor Relations Act provided "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer . . .".

The court sustained the National Labor Relations Board determination that the company was guilty of an unfair labor practice and held:

> "The avowed object of the National Labor Relations Act is to protect commerce by establishing and preserving for employees a right of collective bargaining through a representative of their own choosing.
>
> ". . . the Board thought that this right did not include a presentation of the grievance through a union not the bargaining representative, and did not exclude the latter, . . . again we agree with the Board in principle. When the proviso to Section 9(a) was before Congress, it was proposed to add to it the words 'through representatives of their own choosing'. The words were not added, apparently because they would include other unions. It was not thought good to allow grievance hearings to become clashes between rival

unions. We think an inexperienced or ignorant griever can ask a more experienced friend to assist him, *but he cannot present his grievance through any union except the representative.*

* * * *

"We take it to be a proper matter for collective bargaining to establish an orderly and just method for presenting and adjusting grievances."

The National Labor Relations Board, in the *Hughes Tool Company* case, 14 LRRM 244, 56 N. L. R. B. 981, 2, had held:

"The Act confers on the representative selected by a majority of the employees in an appropriate unit the exclusive right to negotiate and contract in behalf of all employees in the unit concerning rates of pay, wages, hours of employment and other conditions of employment. It thus grants to the exclusive representative the right to contract in behalf of all employees respecting the *procedure* by which grievances are to be presented and adjusted. . . . The Act makes it clear that the right to bargain collectively concerning the establishment of a grievance procedure and to conduct all bargaining for each and every employee in the unit is vested solely in the statutory representative. After the execution of a contract, any adjustment of a grievance constitutes, if the subject matter involved is dealt with in the contract, an interpretation and application of the contract, or, if the subject matter is not dealt with in the contract, bargaining respecting a condition of employment. Again it is clear that these rights are vested exclusively in the statutory representative.

"The interpretation and application of the terms of a contract and the establishment of precedents involved in the adjustment of grievances are often as important, or more important, than the original collective bargaining which led to the signing of the contract. The statutory representative is exclusively entitled to negotiate concerning such interpretation, application and precedents. *No labor organization other than the representative designated by the majority is entitled to deal with the employer concerning any of these matters respecting employees within the unit.*"

This Union has apparently recognized that it cannot claim or enforce any rights as exclusive statutory bargaining representative and has throughout this proceeding stated as its position:

"The Union is not seeking to assert any rights under the Labor-Management Relations Act. It is seeking only to vindicate and enforce contractual rights which existed between it and the Appellant."

The difficulty with that contention,

". . . is the fact that apart from the National Labor Relations Act no union has the right to be exclusive bargaining agent. That extraordinary privilege is extended by the statute and except for the Act, employers are not under compulsion to bargain collectively.

* * * *

"It is the exclusive bargaining arena which the plaintiff would enter. Such an area exists only by the grace of the statute, and admission to it

> can be had only upon statutory terms." *National Maritime Union* v. *Herzog,* 21 LRRM 2648, 78 Fed. Supp. 146.

Those statutory terms are, among other things, that the union be the duly designated representative of a majority of the employees in the bargaining unit, which this Union admittedly is not.

Nor is the Union on any sounder ground when it states that "It is seeking only to vindicate and enforce contractual rights . . .".

See:

> *N. L. R. B.* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, affd. 321 U. S. 678.

If the agreement in this case attempted, which it does not, to grant to this Union rights as exclusive bargaining agent when that Union does not represent a majority of the employees and has disclaimed and abandoned its certification, it would be in direct conflict with the public policy of the United States and unenforcible.

As held in *New York State Labor Relations Board* v. *Holland Laundries,* 294 N. Y. 480, 494:

> "No agreement of the employee and the employer and no litigation between them for the vindication of their private rights can deprive the public of its right to protection against labor practices which the Legislature has forbidden."

But an analysis of the agreement itself clearly indicates that the parties never intended that the Union have any rights thereunder except in a legitimate

status as the sole and exclusive collective bargaining agent derived from its certification from the National Labor Relations Board.

The Union itself recognizes this in its petition which initiated this proceeding (fol. 21):

> "3. That on or about and under date of June 1, 1944, petitioner, *as the sole and exclusive collective bargaining representative* of the tannery employees of respondent, *so certified by the National Labor Relations Board . . . entered into a collective labor agreement. . . .*"

The agreement defines its scope and purpose as follows (fols. 51, 52):

> "Article I. *Scope. It is the purpose of this agreement to provide for the terms and conditions of employment of production and maintenance employees* . . . employed in and about the plants of Endicott Johnson Corporation, Endicott, New York, in the appropriate unit *for the purposes of collective bargaining established by the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act* and the rules and regulations, as amended, of said Board.
>
> "Article II. *Recognition.* (a) *The employer recognizes the Union as the exclusive representative of the employees in its employ at Endicott, New York, in those classifications eligible to vote in an election conducted on December 18, 1942 under the direction and supervision of the Regional Director of the Third Region (Buffalo, New York)* . . . for the purpose of collective

bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment."

The agreement then concludes (fol. 113):

"IN WITNESS WHEREOF, the Employer has caused this instrument to be duly executed by its proper officer and its common or corporate seal to be hereunto affixed, *and the Union, acting on behalf of the employees, being duly authorized so to do, has caused this instrument to be signed* by the International Fur and Leather Workers Union of the United States and Canada, affiliated with the Congress of Industrial Organizations. . . ."

Section 7 of the Labor-Management Relations Act, *supra,* guarantees that:

"*Employees shall have the right* to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities.* . . ."

Section 8 of that Act provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7."

The Union admits that it is not the chosen representative of the employees and that they have elected

to refrain from bargaining collectively as they have the right to do under Section 7 of the Act. To compel this Employer to recognize this Union as bargaining agent and so impose it on the employees against their will, would compel this Employer to commit an unfair labor practice which is not only illegal and in violation of the public policy of the United States, but carries with it criminal penalties. Yet, that is what the Courts below have directed.

A collective bargaining agreement is not a sterile instrument, but depends for its effectiveness upon the ability of the parties to meet, negotiate and settle grievances across a collective bargaining table.

You cannot divorce such collective bargaining from the arbitration and say the former rests in one union and the latter rests in another.

Yet, if the Employer in the instant case is required to proceed to arbitration with a Union not the barginging agent, it will have no right to discuss and settle the grievances since the Union does not represent the employees, without violating the Labor-Management Relations Act, *supra*.

On the other hand, if it fails to proceed to arbitration it will violate the order of the Courts below.

This is the dilemma in which the Employer finds itself, and we respectfully submit that that dilemma has been created because the Courts below fail to recognize that the issue involved is whether or not an employer may be compelled to continue the collective bargaining process with a union which admittedly has no bargaining rights.

This question involves the interpretation of a federal statute and is of extremely serious import since the affirmance of the Courts below would not only cause chaos in labor relations and industrial strife,

but will result in giving to a state court the power to determine a bargaining agent in violation of the Labor-Management Relations Act, *supra*, which intended to give that jurisdiction exclusively to the National Labor Relations Board.

POINT IV.

Article 84 of the Civil Practice Act of the State of New York, is circumscribed and inherently limited by the Federal Labor-Management Relations Act when questions within the exclusive orbit of that latter statute are involved.

In *Steel* v. *Louisville & Nashville Railroad Company*, 323 U. S. 192, 15 LRRM 708, 713, the United States Supreme Court held:

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . .
>
> * * * *
>
> ". . . *the right asserted, which is derived from the duty imposed by statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted.*"

In *Western Union Telegraph Company* v. *Moss*, 125 U. S. 350, the Supreme Court ruled that a state cannot by statute infringe upon a federally protected right.

In *Hill* v. *Florida,* 325 U. S. 538, 543, 16 LRRM 734, the court declared unconstitutional a state statute:

> ". . . which brings about a situation inconsistent with the federally protected process of collective bargaining."

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be granted in this case.

Respectfully submitted,

HOWARD A. SWARTWOOD,
Attorney for Endicott Johnson Corporation,
Sales Building,
Endicott, New York.

APPENDIX 1.

Article 84 of the Civil Practice Act of the State of New York.

§ 1448. ***Validity of arbitration contracts or submissions.*** Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, *or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties.

A controversy *cannot be arbitrated,* either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by

reason of lunacy, idiocy or habitual drunkenness *unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.*

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission *or contract* has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

The second subdivision of this section does not prevent the *arbitration* of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower. [Am. L. 1937, ch. 341; L. 1940 ch. 851, in effect April 28; L. 1941 ch. 288, in effect April 12.]

* * * *

§ 1450. Remedy in case of default. *The making of a contract or submission for arbitration described in section fourteen hundred forty-eight hereof, providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme court of this state to enforce such contract or submission.* A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in *such* section may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight days' notice in writing of such application shall be served upon

the party in default. Service thereof shall be made *in the manner specified in the contract or submission, and if no manner be specified therein, then* in the manner provided by law for personal *service of a summons, within or without the state,* or substituted service of a summons, *or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the court or judge may direct.* The court, or a judge thereof, shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission.

If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. Whenever an immediate trial is ordered the order therefor shall provide that if the court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration was made or a submission was entered into, as the case may be, and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order shall provide that if the court or jury, as the case may be, find that there was no such contract or submission or failure to comply

therewith then the proceeding shall be dismissed. [Added L. 1937, ch. 341, in effect Sept. 1, renumbering former § 1450 as § 1453; am. L. 1944 ch. 423, in effect Sept. 1.]

APPENDIX 2.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

PETITION FOR CERTIFICATION OF REPRESENTATIVES

Petitioner alleges that a question affecting commerce has arisen concerning the representation of employees of the employer named below, within the meaning of Section 9 (c) of the National Labor Relations Act, and requests the National Labor Relations Board to investigate such question and certify to the parties the name or names of the representatives that have been designated or selected.

1. Name of employer The Endicott-Johnson Corporation.

2. Address(es) of establishments (s) involved: Endicott, New York.

3. Industry Tanners and shoemakers.

4. Bargaining unit which petitioner alleges to be appropriate.

INCLUDES:

All production and maintenance employees (including employees in the machine shop, mechanical building, and

two powerhouses), fire prevention employees (excluding the chief, assistant chief, captains, and lieutenants), and chemical manufacturing employees, employed in and about the tanneries of the Company at Endicott, New York,

EXCEPT FOR

Office, clerical, and supervisory employees, employees in the chemical laboratory located in the mechanical building, foremen, and assistant foremen, and any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

5. Number of employees in the alleged appropriate unit 2000.

6. Are there any individuals or other labor organizations who claim to represent any employees in the alleged appropriate unit; or are there any collective bargaining contracts covering any such employees? Yes. If so, state name and address of representative, affiliation, if any, and expiration date of any contracts: Petitioner presently represents employees in above unit. Contract expires June 1, 1947.

7. Has the petitioner notified the employer of claim that a question concerning representation has arisen? No. If not, explain failure to do so. Company by letter dated May 8, 1947 has refused to recognize petitioner until and unless claim is re-established.

8. Petitioner Local 285, International Fur and Leather Workers Union, C. I. O.

By GEORGE O. PERSHING
District Director
1108 North Street
Endicott, N. Y.
(Telephone 691)

DO NOT WRITE IN THIS SPACE

Case No. 3 R 1572
Docketed May 13, 1947

Subscribed and sworn to before me this 13th day of May 1947, at Buffalo, New York, as true to the best of deponent's knowledge, information and belief.

SALVATORE COSENTINO
Board Agent or Notary Public

NOTE: Petitioner should submit with this petition, for examination by Board agents, (1) membership cards, designation cards, or other proof of its designation as bargaining agent by any employees within the alleged appropriate unit, and (2) an alphabetized list of such designations, including dates thereof.

(SUBMIT ORIGINAL AND THREE COPIES OF THIS PETITION)

APPENDIX 3.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

ENDICOTT JOHNSON CORPORATION

and

LOCAL 285, INTERNATIONAL FUR AND LEATHER WORKERS UNION, C. I. O.

Case No. 3-R-1572

ENDICOTT JOHNSON CORPORATION

and

UNITED SHOE WORKERS OF AMERICA (CIO)

Case No. 3-R-1589

ORDER GRANTING MOTION

The Petitioners having orally moved at a hearing on August 11, 1947, to withdraw the petitions for certification of representatives previously filed in the above-entitled proceedings, no objections having been filed by any of the parties, and the motion having been referred by the Hearing Officer to the Board,

IT IS HEREBY ORDERED that the request of the Petitioners to withdraw the said petitions be, and it hereby is, granted.

Dated, Washington, D. C., August 19, 1947.

By direction of the Board:

HARRY F. JONES
Acting Chief, Order Section

APPENDIX 4.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

ENDICOTT JOHNSON CORPORATION

and

LOCAL 285, INTERNATIONAL FUR AND LEATHER WORKERS UNION, C. I. O.

Case No. 3-R-1572

MOTION TO INTERVENE

The undersigned labor organization, having heretofore been designated by employees in the unit for which Petitioner in the above-entitled matter seeks certification, hereby moves to intervene in these proceedings.

United Leather Workers International Union A. F. of L.
(Intervenor)

By: Charles A. Soper, Vice Pres.
(Name and Title)

Dated: August 11, 1947

FILED
NOV 16 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 404

In the Matter of the Arbitration

of

Certain Controversies between LIONEL LANE, as President of Endicott Leather Workers Union, Local 285, International Fur and Leather Workers Union of the United States and Canada, CIO,

and

ENDICOTT JOHNSON CORPORATION,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, BROOME COUNTY

BRIEF IN OPPOSITION

NATHAN WITT,
Attorney for Endicott Leather Workers Union, Local 285,
9 East 40th Street,
New York 16, New York.

RALPH SHAPIRO,
on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 404

In the Matter of the Arbitration

of

Certain Controversies between LIONEL LANE, as President of Endicott Leather Workers Union, Local 285, International Fur and Leather Workers Union of the United States and Canada, CIO,

and

ENDICOTT JOHNSON CORPORATION,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, BROOME COUNTY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Court of Appeals of the State of New York unanimously affirmed, without opinion, 299 N. Y. 725 (R. 109) the decision of the Appellate Division, Third Department, 274 App. Div. 833 (ff. 313-319) which in turn unanimously affirmed the Supreme Court of the State of New York, Special Term, Broome County, 75 N. Y. S. (2d) 171 (not officially reported) (ff. 250-278).

Jurisdiction

The order of affirmance by the Court of Appeals (R. 109-111) was entered on July 19, 1949. The petition for writ of certiorari was filed October 17, 1949. The petition states (pp. 4, 18) that jurisdiction of this Court is based on 28 U. S. C. A. 344(a), as amended; presumably petitioner refers to 28 U. S. C. A. 1257(3) in the revision effective September 1, 1948.

Statement

In 1944, the Union, as the certified bargaining representative of the employees in an appropriate bargaining unit, entered into a collective bargaining agreement with the employer for a term to expire June 1, 1947 (f. 21; Pet. Ex. A, ff. 43-144). The agreement fixed wages, hours, and conditions of employment, including a provision against discharge without just cause and provided for a procedure, culminating in arbitration, for the settlement of all grievances and disputes arising between the parties during its term (Art. VIII, ff. 95-106).

During the term of the agreement, disputes arose respecting wage rates to be paid to rollers in the sole leather tannery and concerning the employer's discharge of three workers which the Union claimed to be unjust. During the term of the agreement the Union demanded arbitration of these disputes, and, at the time of its expiration, June 1, 1947, the parties were engaged in discussions for the selection of the arbitrator (f. 186).

On June 12, 1947, the employer notified the Union that the agreement having expired it would no longer submit the disputes which had arisen under and during the term of the agreement, and which were pending at the time of its expiration, to arbitration (ff. 151-153).

Thereafter, and upon the enactment of the Labor-Management Relations Act, 1947, the employer asserted as an additional reason for its refusal to arbitrate, the existence of that statute and the Union's non-compliance therewith.

The New York Supreme Court held that the agreement to arbitrate having concededly been made and the employer's refusal to arbitrate being admitted, an order directing arbitration of the rights of the parties under the contract would be entered. The order provided, however, that the arbitration be restricted "to so much of the said grievances as were pending during the life of said contract, and in no event beyond midnight May 31, 1947" (f. 11), the expiration date of the agreement.

The Appellate Division unanimously affirmed in a per curiam opinion and the Court of Appeals unanimously affirmed without opinion.

The Question Presented

Is the order, made pursuant to the provisions of the New York arbitration statute (C. P. A. Article 84), directing petitioner to submit to arbitration two controversies arising under and pursuant to the terms of the concededly valid collective bargaining agreement, repugnant to the Labor-Management Relations Act, 1947?

Argument

The nub of petitioner's argument is that this proceeding, to compel arbitration of grievances arising under and during the existence of a concededly valid collective bargaining agreement, is equivalent to a demand for collective bargaining rights under the Labor-Management Relations Act. It is obvious, however, that the sole purpose and effect of the proceeding is to compel petitioner to arbitrate grievances arising under a concededly valid col-

lective bargaining agreement in order to vindicate rights flowing only from that agreement and not from any statute. The rights involved are the right not to be discharged without just cause and to be paid certain wage rates. The statute has nothing to do with these matters. They stem entirely from the provisions of the contract, the validity of which is not in question at all.

The order of the New York Supreme Court does not establish the Union's right to negotiate a new contract upon the expiration of the 1944 agreement. Nor does it determine the Union's status as the collective bargaining representative beyond the term of the agreement in question. Indeed, as noted, the Supreme Court has expressly limited the arbitration to the period of the agreement.

The New York Court of Appeals has made clear that an order directing arbitration under the provisions of a collective bargaining agreement does not involve a determination of the statutory bargaining rights, that matter lying within the exclusive jurisdiction of the National Labor Relations Board. *Levinsohn* v. *Joint Board,* 299 N. Y. 454.

This, of course, disposes of *Amazon Cotton Mills* v. *Textile Workers Union,* 167 F. (2d) 183 and *International Longshoremen's and Warehousemen's Union* v. *Sunset Line and Twine Co.,* 77 F. Supp. 119, cited by petitioner (pp. 23-25). Those cases deal with the enforcement of rights which by *statute,* i.e. the Labor Management Relations Act, 1947, had been placed exclusively in the hands of the National Labor Relations Board. The purport of the decisions in those two cases was that the respective plaintiffs could vindicate rights, created solely by the Act, only before the administrative tribunal created for that specific purpose.

The Union in this proceeding is not, however, seeking to assert any statutory rights granted by the Act. It seeks only to enforce the arbitration provisions of a concededly valid collective labor agreement—a proceeding which does not even remotely involve the Labor Manage-

ment Relations Act, 1947, and which, by no stretch of the imagination draws into question the validity of Article 84.

Further, compliance with that Act is not a condition precedent to arbitration under the provisions of a valid agreement. Compliance is merely a condition precedent to application to the Board for its facilities, including certification. Non-compliance by a labor union does not impair the validity of contracts made by the Union with employers absent a claim to representation by another union, which is not involved here.

If petitioner's position were upheld, unions which have not complied with the filing and affidavit requirements of the Act for the more than two years since its enactment could not seek arbitration of grievances under their agreement, nor, indeed, enforce their agreements in any way whatever. Yet, it is common knowledge, that many unions which have complied only recently and others which are not yet in compliance have concluded, since the enactment of the Labor-Management Relations Act, 1947, literally hundreds of agreements which have not heretofore been questioned. Petitioner's position is that a non-complying union not only has no right of access to the National Labor Relations Board but cannot conclude an enforceable collective bargaining agreement. The provisions of the Act do not support this position, which could lead only to chaos and confusion in labor relations.

This case is a classic illustration of procrastination by an employer to avoid settlement of controversies pending since early in 1947 concerning grievances which are at the very heart of employer-employee relationship-wage rates and the propriety of discharges. The Supreme Court correctly said that if petitioner's position were upheld, it would "place a premium on delay and give reward to dilatory tactics." (f. 260) since an employer could, as the expiration of the collective bargaining agreement approached, forestall the arbitration process required by the agreement and, upon its expiration, refuse to proceed because the contract was no longer in effect.

There is no merit to this petition. No conflict of decisions is involved and no federal question meriting review by this Court is presented. Therefore, it should be denied.

Respectfully submitted,

NATHAN WITT,
Attorney for Endicott Leather Workers Union, Local 285,
9 East 40th Street,
New York 16, New York.

RALPH SHAPIRO,
on the Brief.